83-1386

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HON. RONALD A. LEGGETT,
Collector of Revenue in the City of St. Louis,
HON. PAUL M. BERRA,
Comptroller of the City of St. Louis,
and
the CITY OF ST. LOUIS,
Petitioners,

v.

CRATON LIDDELL, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether and under what circumstances, if any, the judicial power of the United States extends to the levying of taxes for the purpose of implementing remedies for constitutional violations?

2. Whether 28 U.S.C. §1341 affects the remedial powers of the federal courts?

3. Whether a district court, notwithstanding 28 U.S.C. §1341 and established principles of comity and federalism, can enjoin reductions in local property taxes and assume continuing jurisdiction over local property tax rates in a political subdivision to fund a settlement or a remedy of a claimed constitutional violation?

4. Whether a district court, in enforcing a settlement or remedy in an interdistrict school desegregation case, can enjoin the statutory reduction of school property taxes in a single school district, where the property tax reduction is offset by sales tax revenue distributed to the school district, in the absence of any evidence or findings that the operation of the state tax law impeded or will impede desegregation in the school district?

5. Whether, on appeal from an order approving a settlement agreement in an interdistrict school desegregation case under Rule 23(e), F.R.Civ.P., a court of appeals may properly supply findings necessary to convert the interdistrict settlement into an intradistrict remedy, and leave in effect an injunction forbidding a school property tax reduction, notwithstanding the appellate court's conclusion that the record did not support many aspects of the settlement, considered as a remedy, and the conclusion that the injunction was entered without the necessary legal or factual predicate?

PARTIES

The parties to the proceedings below are as follows:

The City of St. Louis, Missouri, a constitutional charter city under the law of Missouri, plaintiff-intervenor below;

Hon. Paul M. Berra, Comptroller of the City of St. Louis and voter and taxpayer; petitioner in Court of Appeals, not a party in district court;

Hon. Ronald A. Leggett, Collector of Revenue in the City of St. Louis and voter and taxpayer; petitioner in Court of Appeals; added as a party in district court on January 10, 1984;

Hon. William L. Hungate, United States District Judge for the Eastern District of Missouri, as presiding judge in the proceedings in district court, was respondent in proceedings in prohibition in the Court of Appeals;

Craton Liddell, a minor by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri;

Earline Caldwell, Lillie Caldwell, Dwayne Daniels, Gwendolyn Daniels, Stephanie Williams, Gloria Williams, Robert Smith, and the National Association for the Advancement of Colored People, as representatives of a class of students and parents now attending or who will attend public primary and secondary schools located in St. Louis City and County;

Board of Education of the City of St. Louis, State of Missouri, Julius Dix, David Mahan, Anne Price, and Rufus Young, Jr. (Area Superintendents); Penelope Alcott (President), Nathaniel Johnson, Lawrence E. Nicholson, Daniel Schesch, Dorothy C. Springer, Joyce M Thomas, Raymond Decker, Richard K. Gaines, Roy B. Gillyon, John P. Mahoney, Marjorie R. Smith, Michael K. Sheehan (Members of the School Board); Jerome Jones (Superintendent of Schools), all in their official capacities;

St. Louis County, Gene McNary, County Executive, Harlow Richardson, County Treasurer, George C. Leachman, Collector of St. Louis County Contract Account,

Affton Board of Education, Bayless Board of Education, Brentwood Board of Education, Clayton Board of Education, Ferguson-Florissant Reorganized R-2 Board of Education, Hancock Place Board of Education, Hazelwood Board of Education, Jennings Board of Education, Kirkwood Board of Education, Ladue Board of Education, Lindbergh Board of Education, Maplewood-Richmond Heights Board of Education, Mehlville Board of Education, Normandy Board of Education, Parkway Board of Education, Pattonville Board of Education, Ritenour Board of Education, University City Board of Education, Webster Groves Board of Education and Wellston Board of Education,

State of Missouri; Arthur Mallory, Commissioner of Education of the State of Missouri, in his official capacity; Christopher S. Bond, Governor of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E. Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; The State of Missouri Board of Education and its members Erwin A. Williamson (President), Jimmy Robertson (Vice-President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton and Robert Welling.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	v
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Petition for Writ of Certiorari	8
I. The petition ought to be granted because fundamental constitutional questions of imperative national importance concerning the judicial power of the United States are presented, in that the courts below have exceeded or usurped judicial power by seeking to increase or otherwise control school property tax rates pursuant to a settlement agreement in an interdistrict school desegregation case	8
II. The petition ought to be granted because the decision of the court of appeals is in direct conflict with controlling decisions of this Court and decisions of other courts of appeals	21
III. The petition ought to be granted because the decision of the court of appeals, by refusing to overturn an admittedly erroneous injunction inflic-	

ting higher school taxes on the people of the City of St. Louis, and by attempting to convert a settlement agreement into a remedy by providing findings not supplied by the district court, is such a departure from the usual course of judicial procedure as to require exercise of this Court's powers of supervision 26

Conclusion 30

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186 (1962) 14

City of Catlettsburg v. Davis' Adm'r., 262 Ky. 726, 91 S.W.2d 56 (1936) 11

Commonwealth of Virginia v. State of West Virginia, 246 U.S. 565 (1918) 14, 20

DeBeers Consol. Mines v. United States, 325 U.S. 212 (1945) 3, 25

Elrod v. Burns, 427 U.S. 347 (1976)..... 14

Evans v. Buchanan, 582 F.2d 730 (3d Cir. 1978), cert. denied sub nom. Delaware State Bd. of Education v. Evans, 446 U.S. 923 (1980).....11, 17, 23, 25, 29

Ex parte Republic of Peru, 318 U.S. 578 (1943)..... 25

Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981)..... 20

Green v. Frazier, 253 U.S. 233 (1920) 14

Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486 (4th Cir. 1964) 10, 23

Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 10

Heine v. The Levee Commissioners, 86 U.S. (19 Wall.) 655 (1874) 17

Immigration & Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983) 14

Jones v. Wittenberg, 330 F.Supp. 707 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972) 14

Katzenbach v. Morgan, 384 U.S. 641 (1966) 15

Liddell v. Bd. of Education, 469 F.Supp. 1304 (E.D. Mo. 1979), rev'd sub nom. Adams v. United States, 620 F.2d 1277 (8th Cir. en banc), cert. denied, 449 U.S. 826 (1980), on remand, 491 F.Supp. 351 (E.D.Mo. 1980), aff'd, 667 F.2d 643 (8th Cir.), cert. denied, 451 U.S. 902 (1981), appeal after remand, 677 F.2d 626 (8th Cir.), cert. denied, 103 S.Ct. 172 (1982) 2

Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1874) 12, 16

Louisiana ex rel. Hubert v. Mayor & Council of New Orleans, 215 U.S. 170 (1915) 12

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) . 20

Meriwether v. Garrett, 102 U.S. 472 (1880) 14, 23

Milliken v. Bradley I, 418 U.S. 717 (1974) 18

Milliken v. Bradley II, 433 U.S. 267 (1977) 17, 19, 27

Oliver v. Kalamazoo Board of Education, 640 F.2d 782 (6th Cir. 1980) 24, 28

Olmstead v. United States, 277 U.S. 438 (1928) 16

Palmer v. Thompson, 403 U.S. 217 (1971) 10

Plaquemines Parish School Bd. v. United States, 415 F.2d 817 (5th Cir. 1969) 15, 23

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 21, 27

Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874) 12

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 17, 18, 20, 23

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 25

State ex rel. Emerson v. City of Mound City, 335 Mo. 702, 73 S.W.2d 1017 (banc 1934) 11

State of Virginia v. Commonwealth of West Virginia, 246 U.S. 656 (1918) 15

The Five Knights' Case, 3 Howell S.T. 51 (1627) 12

The Question of Ship Money, 3 Howell S.T. 843 (1637) . 12

Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 P. 1003 (1926) 11

United States v. County of Clark, 95 U.S. (5 Otto) 769 (1877) 12

United States v. County of Macon, 99 U.S. 582 (1873) .. 12

United States v. Missouri, 515 F.2d 1365 (8th Cir.), cert. denied, sub nom. Ferguson Reorg. School Dist. v. United States, 423 U.S. 951 (1975) 10, 11

United States v. Scotland Neck City Bd. of Education, 407 U.S. 484 (1972) 22

Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) 20

Wright v. Council of City of Emporia, 407 U.S. 451 (1971) 20, 22

Constitutions, Statutes and Rules:

U.S. Const., art. I, §8 13

U.S. Const., amend. IX 15, 16, 17, 30

U.S. Const., amend. XIV 15, 30

Mo. Const. art. X, §2 15

Mo. Const. art. X, §11 ..... 5, 15

Mo. Const. art. X, §§16-22 ..... 5, 15

28 U.S.C. §1254(1) 2

28 U.S.C. §1341 ..... i, 6, 17, 19, 21, 25, 29

28 U.S.C. §1651(a) 2

Supreme Court Rule 17 26

Rule 21 F.R.A.P. 26

Rule 23(e), F.R.Civ.P. ..... i, 3, 18

Rule 35, F.R.Civ.P. 25

Rule 52, F.R.Civ.P. 27

Mo. Rev. Stat. §139.031 (Supp. 1983) 5

Mo. Rev. Stat. §148.660, .670 (Supp. 1983) 6

Mo. Rev. Stat. Ch. 163 (1978) 5

Mo. Rev. Stat. §164.013 (Supp. 1983) 22

Other authorities:

Bill of Rights, 1 Wm. & Mary, st. 2, c.2 (1689) 12

Magna Carta, §§12, 14 (1215)..... 12

1 Sources of English Constitutional History 117-18 (Stephenson & Marcham ed., 1972) 12

The Federalist, No. 47, p. 324 (Cooke ed. 1961) 30

The Federalist, No. 78, pp. 522-23 (Cooke ed. 1961).... 13

Frug, The Judicial Power of the Purse; 126 U.Pa.L.Rev. 715 (1978) 13

Eisenberg & Yeazell, The Ordinary and Extraordinary in Institutional Litigation, 93 Harv.L.Rev. 465 (1980) 13

Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan.L.Rev. 661 (1978) 13

Comment, Enforcement of Judicial Financing Orders, 59 Geo.L.J. 393 (1970) 13

Cong. Globe, 39th Cong., 1st Sess., 6, 806, 1033, 2444ff., 2459ff., App. 217ff 15

32 U.S.L.W. 3216 (1963)..... 10

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v.

CRATON LIDDELL, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Come now the Honorable Ronald A. Leggett, Collector of Revenue in the City of St. Louis, the Honorable Paul M. Berra, Comptroller of the City of St. Louis, voters and school property taxpayers therein, and the City of St. Louis, a constitutional charter city of the State of Missouri, and respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 8, 1984, in this case.

OPINIONS BELOW

The order and opinion of the district court giving rise to this petition is reported at 567 F.Supp. 1037, and is reprinted in Appendix A. The opinion and order of the United States Court of Appeals for the Eighth Circuit, en banc, denying petitioners' application for a writ of prohibition in that Court, and substantially affirming the district court, was entered on February 8, 1984, and is not officially reported, but is reprinted in Appendix K (the opinion of the Court of Appeals is printed last, owing to the time of receipt and of filing the instant petition in this Court). A preliminary order of the Court of Appeals, staying

parts of the district court's order of July 5, 1983, is reported at 717 F.2d 1180, and is reprinted in Appendix I. Relevant prior opinions of the District Court and the Court of Appeals in the underlying case are reprinted in Appendix G, and are reported at 620 F.2d 1277 (8th Cir. en banc), cert. denied, 449 U.S. 826 (1980), on remand, 491 F.Supp. 351 (E.D.Mo. 1980), aff'd, 667 F.2d 643 (8th Cir.), cert. denied, 451 U.S. 902 (1981), appeal after remand, 677 F.2d 626 (8th Cir.), cert. denied, 103 S.Ct. 172 (1982). See also 546 F.2d 768 (8th Cir. 1976), cert. denied, 433 U.S. 914 (1977); 693 F.2d 721 (8th Cir. 1981).

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on February 8, 1984; no rehearing was sought by petitioners. This petition is filed within 90 days after entry of the judgment of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal and state constitutional and statutory provisions germane to this petition are set forth in Appendix H. In addition, 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The instant case originated as an intradistrict school desegregation case in 1972, and a summary of the proceedings through July 5, 1983 is included in the district court's opinion, see Appendix A, pp. A41-A48. In August, 1981, various motions were granted whereby additional parties defendant were added and interdistrict claims were asserted. See Appendix A,

pp. A42-A43; Appendix F, *passim.;* see also Appendix G, 677 F.2d 626.

In February, 1983, at the time that trial as to certain interdistrict defendants on the interdistrict claims was to commence in the district court, that court was told that the possibility of settlement existed, and granted a delay to permit further negotiations. Eventually, an "agreement in principle," delineating general terms of a settlement of all interdistrict school desegregation claims in the case, was filed. See Appendix A, pp. A46-A47; Appendix C, p. A55. Further time was allowed to develop a detailed implementation plan, which was duly filed on March 24, 1983, and is hereinafter described as the "settlement agreement" or "settlement plan." See Appendix C. The United States and the City of St. Louis, intervenor plaintiffs who had been excluded from negotiations, and the State of Missouri refused to subscribe to either the "agreement in principle" or the final settlement agreement. Appendix A, pp. A10-A11, A47. Among the provisions of the settlement agreement were the following:

> ...the cost of the settlement shall be paid by such combination of State funding and a tax rate increase in the City of St. Louis as shall be ordered by the Court,...
>
> * * *
>
> The fulfillment of the obligations of the parties is contingent upon an Order by the Court which establishes adequate funding for the obligations of the parties, consistent with the Agreement in Principle and this Settlement Agreement.
>
> * * *

Appendix C, pp. A55, A125, A127.

The district court, acting pursuant to Rule 23(e), F.R.Civ.P., promptly scheduled a fairness hearing, to determine if the proposed settlement could be approved as fair, reasonable and ade-

quate to the plaintiff classes. Appendix A, p. A47. At the fairness hearing, substantial evidence was adduced concerning the cost of the proposed settlement, and the manner in which the State and the taxpayers of the City of St. Louis would be expected to pay those costs. At the time of the fairness hearing, the estimated costs of the "Quality Education" provision of the settlement were placed at over $800,000,000. See Appendix D, pp. A147-A148, A169; Appendix C, pp. A86-A103. (Subsequently, the district court conducted a "budget hearing" and approved expenditure of approximately $46,000,000 to fund parts of the settlement in the first year of operation. See Appendix J, pp. A392-A393; Appendix K, p. A475). Witnesses for the St. Louis Board of Education (an interdistrict plaintiff) testified at the fairness hearing that annual applications for funds would be made to the district court, despite the fact that the Board's annual revenues exceed $180,000,000. Appendix D, pp. A148-A149, A170. The evidence also revealed that tax increases in the City of St. Louis of the magnitude required to fund any substantial portion of the settlement cost would directly affect the City government's ability to raise revenue for its own purposes and would harm the City's economy generally. *Id.*, pp. A152-A155, A157-A159.

After receiving a report from an appointed financial advisor, see Appendix A, pp. A25-A26, the district court entered an order on July 5, 1983, which approved the settlement agreement pursuant to Rule 23(e), F.R.Civ.P., and assumed control of the school property tax rates in the City of St. Louis. See Appendix A, pp. A1, A4, A13, A33. In particular, the district court enjoined the School Board from reducing its property tax rate in 1983 as required by a recently enacted state sales tax law, see Appendix K, pp. A448-A449, allocated various expenses of the settlement agreement between the State of Missouri and the St. Louis Board of Education, ordered the Board to submit a bond issue to the voters of the City before February 1, 1984, and directed the Board to certify to the court "the amount needed to meet its share of the costs of the Settlement Plan and the tax rate necessary to fund these costs along with its other obliga-

tions." Appendix A, pp. A3-A4, A34-A35, A38. The Board initially reported to the Court that it would require a property tax increase of $.86 per hundred dollars of assessed valuation to fund its share of the costs of the settlement. See Appendix E. After the filing of the district court's budget order, the School Board reported that it would require a somewhat smaller property tax increase; the opinion of the Court of Appeals, reversing parts of the district court's budget order leaves the cost of the settlement agreement in doubt. See Appendix K, pp. A407-A408a.

In the tax collection process in the City of St. Louis, the Comptroller of the City must certify all tax rates for inclusion on tax bills, which are prepared by the City's assessor.[1] The Collector of Revenue, an independent elected county official not part of the City government, must collect all taxes appearing on real and personal property tax bills and defends against all taxpayer protest actions and suits to enjoin collection. See Mo. Rev. Stat. §139.031 (Supp. 1983); see also Appendix D, p. A151.

As property taxpayers, petitioners Leggett and Berra were deprived in fact of a property tax reduction of some $.42 per hundred dollars[2] of assessed valuation by the orders of the

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[1] The City Board is an autonomous political subdivision, governed by an elected board of education, Mo. Rev. Stat. §162.571 (1978). Like all Missouri school districts, it is funded by a combination of state and federal assistance and local property taxes. See Mo. Rev. Stat. Ch. 163 (1978); Appendix D, p. A170. The local property taxes of school districts in Missouri are limited by Mo. Const. art. X, §§11(b) and (c), and §§16-22 (1980); see Appendix H. The St. Louis school district is geographically coterminous with the City of St. Louis, but the City government is distinct; the Collector of Revenue collects taxes levied by the City School Board, as well as property taxes of all other taxing jurisdictions in the City.

[2] The district judge thought he was preventing a rate reduction of $.58/$100, see Appendix A, p. A36, but later information indicates that the reduction would have been $.42/$100.

district court, and faced the future prospect of having to pay additional judicial taxes included on the tax bills, or face personal liability or loss of real property. As voters in the City of St. Louis, petitioners Leggett and Berra were stripped of their right to vote on any increases in the School Board's tax rate. See Appendix H, pp. A346-A347. Consequently, these petitioners (who were not parties in the district court) joined with the City of St. Louis in seeking a writ of prohibition in the Court of Appeals for the Eighth Circuit, citing *inter alia,* 28 U.S.C. §1341, to prevent the district judge from enforcing his order enjoining reduction of the School Board's tax rate and from taking further action to enforce the settlement agreement by orders affecting the tax rate in the City of St. Louis. The City of St. Louis, as plaintiff-intervenor in the district court, also filed an appeal from the district court's order, since it stood to lose part of distributions of certain statewide taxes if the School Board's property tax rate increased, see Mo. Rev. Stat. §§148.660, .670 (Supp. 1983).

The United States Court of Appeals for the Eighth Circuit, en banc, heard oral argument on applications for stays of the district court's order of July 5, and on the petition for writ of prohibition, in September, 1983. On September 13, 1983, the court of appeals refused to rule on the petition for writ of prohibition, but partially stayed the district court's order. See Appendix I. Without articulating any reasons, other than the press of time, see Appendix I, pp. A355, the court of appeals did not disturb the district court's injunction against the school tax reduction in the City of St. Louis, pending consideration of the appeals.

On February 8, 1984, the court of appeals denied petitioners' writ of prohibition, and largely affirmed the order of the district court. See Appendix K. In the process, the court of appeals substantially rewrote the settlement agreement approved by the district court, deleting many portions that the court of appeals did not deem to be proper remedies based on the record before it, and (apparently) reducing the cost of implementation of the

agreement.[3] In the course of revising the settlement, evidently to "preserve its constitutionality," Appendix K, p. A408a, the court of appeals substituted its own findings of fact for those of the district court, or supplied findings omitted by the district court altogether. The court of appeals explicitly upheld that part of the settlement calling for court-ordered taxation, holding that "the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate." *Id.*, p. A449. However, the court held that such action was appropriate only after a showing of need by the School Board and a showing of exhaustion of all other alternatives. *Id.*, pp.A455-A456. Since neither condition was satisfied on the record before it, the court of appeals held that the July 5 order enjoining a school tax reduction in the City of St. Louis in 1983 was erroneous. *Id.*, p. A455. Notwithstanding the absence of any legal or factual predicate for the district court's order, the court of appeals refused to reverse it, or prohibit its enforcement, relying on vague "equitable considerations" involving potential "disruption" of school finance in the City of St. Louis. *Id.*, p. A449. The court of appeals also set forth a detailed program to be followed by the district court in increasing property taxes in the future. *Id.*, pp. A455-A456. The court of appeals gave no consideration to the harm or disruption which the district court's order occasioned to the taxpayers of the City or to state laws governing tax collection and protest.

In the interim between the order of the district court and the opinion of the court of appeals, school property tax collections in the City proceeded in accordance with the district court's

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[3] The court of appeals ordered the parties to signify promptly their acceptance of the settlement as revised. Petitioners are informed and believe that the parties to the settlement will accede to the appellate revisions. However, part of the district court's order, which enjoined a school tax reduction in 1983 in the City of St. Louis, would remain in force under the court of appeals' mandate, even if the settlement otherwise falls. See Appendix K, pp. A408a, A449.

order. However, petitioner Leggett, despite lack of explicit authorization from the court of appeals, see Appendix I, sought to hold the excess school tax collected in a special escrow account. As a result, he was joined as a party by the district court on January 10, 1984, and ordered to show cause why he should not be held in contempt. Appendix J, pp. A363-A370. The funds collected by reason of the admittedly erroneous order of the district court seemingly are required to be paid over to the St. Louis School Board by the opinion of the court of appeals. Certiorari now is sought from this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE PETITION OUGHT TO BE GRANTED BECAUSE FUNDAMENTAL CONSTITUTIONAL QUESTIONS OF IMPERATIVE NATIONAL IMPORTANCE ARE PRESENTED CONCERNING THE SCOPE OF THE JUDICIAL POWER OF THE UNITED STATES, IN THAT THE COURTS BELOW HAVE EXCEEDED OR USURPED JUDICIAL POWER BY SEEKING TO INCREASE OR OTHERWISE CONTROL PROPERTY TAXES IN ORDER TO ENFORCE A SETTLEMENT AGREEMENT IN AN INTERDISTRICT SCHOOL DESEGREGATION CASE, UNDER THE GUISE OF REMEDYING AN INTRADISTRICT CONSTITUTIONAL VIOLATION.

A. The actions of the lower courts patently violate the doctrine of separation of powers and infringe the rights of the people reserved by the Ninth Amendment.

Citing Mark Twain and John Gunther, see Appendix A, pp. A37, A48-A50, the district court has purported to launch one of "the most creative social experiments of our time." *Id.*, p. A12. In the process, the court held that it had the authority to increase school property taxes in the City of St. Louis "*as contemplated by Section X(B)3 of the proposed settlement.*" *Id.*, p. A34 (emphasis added); see also Appendix C, pp. A55, A126.

The district court then enjoined a scheduled reduction in the school property tax rate in the City of St. Louis, *id.*, p. A35, and ordered submission of a bond issue by the School Board to the voters, with the implied threat that the court would act if the voters refused, Appendix A, p. A38, which they did. See Appendix K, p. A447. Finally, the district court stated bluntly that

> In the event the above steps fail to raise the necessary funds to satisfy the City Board's share of the implementation costs, the Court *will enter* an appropriate order, following notice and an opportunity to be heard on the amount, to increase the property tax rate in the City of St. Louis by an amount necessary to fund the City Board's share of the costs of the Settlement Plan. [Appendix A, p. A83, emphasis added.]

The court of appeals affirmed the district court, albeit that court chose to characterize the settlement (after extensive appellate surgery) as a remedy. Appendix K, p. A447. The situation confronting this Court is therefore plain: without express constitutional or statutory authority, lower federal courts have assumed control of local property tax rates in the City of St. Louis. Even if this action was taken pursuant to a judicially-fashioned remedial decree, it would raise constitutional questions of the greatest moment. That the lower courts have acted pursuant to a settlement agreement, for the provisions of which the district court disclaimed any responsibility, Appendix A, p. A10 at n. 2, serves only to highlight the usurpation of judicial power involved.[4]

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[4] It is a cruel irony that the judicial taxation required by the settlement agreement will be borne solely by City residents, the people who were the victims of the allegedly discriminatory acts of the suburban school districts. Thus, under the agreement, even after revision by the court of appeals, a large segment of the plaintiff classes must not only bear the burden of student transfers, but must pay for the capital renovation of the entire city school system, while the interdistrict defendants, other than the State, pay nothing.

No reported federal cases support the lower courts' irruption into judicial taxation. *Griffin v. School Board of Prince Edward County,* 377 U.S. 218 (1964) did suggest that the defendant local officials could be ordered to "*exercise the power that is theirs,*" *id.* at 233, to levy taxes in order to reopen the schools; but the opinion is silent on what authority the defendants had to levy taxes in the first place. The issue of judicial taxation was not presented by the petition for writ of certiorari. See 32 U.S.L.W. 3216 (1963). On remand, it was clear that the issue in *Griffin* was not the levy of taxes, but the refusal of county authorities to appropriate funds to support the public schools, while providing substantial tax funds for sham "private" schools. See *Griffin v. Board of Supervisors of Prince Edward County,* 339 F.2d 486 (4th Cir. 1964). (In Virginia, school boards were "dependent," i.e., they had no independent power to levy any taxes—unlike the School Board here.) *Griffin,* therefore, must be read in light of the massive resistance to school desegregation obtaining at the time, together with the school finance structure in Virginia, and not as settling the serious questions of separation of powers, federalism, and district court jurisdiction over tax rates presented here. It certainly does not stand for the proposition that the Fourteenth Amendment imposes a duty to raise taxes on either state or local governments or on the federal courts, where the authority to tax is otherwise absent. Cf. *Palmer v. Thompson,* 403 U.S. 217 (1971). Nor does it establish that a district court can assume taxing powers pursuant to a settlement agreement.

Similarly, interdistrict school desegregation cases, such as *United States v. Missouri,* 515 F.2d 1365 (8th Cir.), cert. denied, sub nom. *Ferguson Reorg. School Dist. v. United States,* 423 U.S. 951 (1975),[5] are remarkable more for what they have done

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[5] It is worth noting that two members of this Court (BURGER, C.J. and POWELL, J.) indicated that the question of the power of the district court to fix a tax rate should have been reviewed. 423 U.S. 951.

than for what they have said. In *United States v. Missouri,* although the very existence of certain school districts was part of the constitutional violation, the court of appeals refused to allow the district court to fix a tax rate in excess of the highest rate approved by voters in any of the preexisting districts. Despite its reading by the court of appeals here, this case provides little support for the proposition that the federal courts enjoy some remedial power of taxation. Indeed, the analysis in that opinion was chiefly in terms of the Tenth Amendment, and proceeded in the context of somewhat ambiguous state laws concerning school tax rates applicable where districts were annexed or consolidated. The opinion sheds no light whatsoever on the serious questions of separation of powers and fundamental limitations on the power to tax raised here.

Evans v. Buchanan, 582 F.2d 730 (3d Cir. 1978), cert. denied sub nom. *Delaward State Bd. of Education v. Evans,* 446 U.S. 923 (1980)(three Justices dissenting), the only other interdistrict case to discuss taxation, strongly counsels against the sort of action undertaken below. It granted mandamus to compel the district court to defer to a state statute fixing a tax rate, in stark contrast to the instant case, where the court of appeals cavalierly delayed the petition for writ of prohibition and then chose to leave undisturbed an undeniably erroneous order enjoining a tax reduction!

Neither does the meager authority of common law tort cases support the judicial taxation system created by the court of appeals for this case. Only two cases hold that constitutional *and* statutory *tax limits,* as opposed to deficit-spending limits, can be exceeded by order of court to pay specific judgments arising out of breach of an "involuntary obligation." *City of Catlettsburg v. Davis' Adm'r,* 262 Ky. 726, 91 S.W.2d 56 (1936); *Town of Flagstaff v. Gomez,* 29 Ariz. 481, 242 P. 1003 (1926). The theory was rejected in one case, *State ex rel. Emerson v. City of Mound City,* 335 Mo. 702, 73 S.W.2d 1017 (banc 1934). Language in numerous cases in this Court strongly indicates that an Article III court cannot order the levy of any taxes to

pay any judgment in the absence of statutory or constitutional authority for the levy. See, e.g., *Rees v. City of Watertown,* 86 U.S. (19 Wall.) 107 (1874); *Loan Association v. Topeka,* 87 U.S. (20 Wall.) 655 (1874); *United States v. County of Macon,* 99 U.S. 582 (1873); *United States v. County of Clark,* 95 U.S. (5 Otto) 769 (1877).[6] Of course, it need hardly be observed that, insofar as the settlement agreement here is concerned, it is *not* an "involuntary obligation" of anyone who joined in it; it is a settlement, made and entered into as a compromise of disputed interdistrict claims, to which the St. Louis Board of Education voluntarily subscribed as a party plaintiff. See Appendix C, pp. A55, A128; Appendix F.

The struggle to control the power to tax has been a continuing theme in Anglo-American constitutional history. The roots of the principle that taxation without representation is tyranny may fairly be said to be traceable to Magna Carta, §§12, 14 (1215). See reprint at 1 *Sources of English Constitutional History* 117-18 (Stephenson & Marcham ed., 1972). The struggle continued through the Great Rebellion, see *The Five Knights' Case,* 3 Howell S.T. 51 (1627) and *The Question of Ship Money, id.,* 843 (1637), and culminated in Britain in the provision of the Bill of Rights, forbidding taxation without consent of Parliament. 1 Wm. & Mary, st. 2, c. 2 (1689). That the American Constitution continued the struggle and refined the

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[6] The effort of the court of appeals to distinguish these cases, Appendix K at p. A453 n. 20, is unpersuasive. It is clear that every one of these cases was profoundly influenced by what this Court conceived of as a fundamental limitation on the power of the judiciary. As noted elsewhere in this petition, the court of appeals would be on firm ground if there were any kind of statutory authority for higher school taxes in the City of St. Louis. None exists. The case heavily relied on by the court of appeals, *Louisiana ex rel. Hubert v. Mayor & Council of New Orleans,* 215 U.S. 170 (1909), is based primarily on the unlimited authority of the New Orleans city council to levy the taxes in question; which could not later be restricted so as to impair a contract. The case does *not* rest on some equitable, remedial judicial power to tax.

limitations on the power to tax cannot be doubted. The Constitution, art. I, §8 expressly provides that only Congress has the power to lay and collect taxes. Appendix H, p. A344. Except to the extent that the power has been expressly conferred on the legislative branch of government, therefore, it follows that it is reserved by the people; that being so, it may not be exercised by the judiciary.

Writing of the judicial power in reference to the Constitution, Alexander Hamilton stated:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist, No. 78, pp. 522-23 (Cooke ed. 1961).

Today, of course, the judiciary has exerted extensive control over the power of the purse. See generally Frug, *The Judicial Power of the Purse,* 126 U.Pa.L.Rev. 715 (1978); Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation,* 93 Harv.L.Rev. 465 (1980); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 Stan.L.Rev. 661 (1978); Comment, *Enforcement of Judicial Financing Orders,* 59 Geo.L.J. 393 (1970). Nevertheless, to date no federal court has in fact exercised the ultimate power to raise

funds by decree, as distinguished from the more limited power of allocating funds already raised or compelling levy and collection of taxes authorized by law. The former power cannot and must not be exercised by the judiciary. See *Jones v. Wittenberg,* 330 F.Supp. 707 (N.D.Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972).

"The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature." *Meriwether v. Garrett,* 102 U.S. 472, 501 (1880). In so stating, this Court simply adhered to what must be deemed one of the cardinal principles of American constitutional law: the people can be taxed only by their own consent, which is manifested only in Congress or in their legislatures. *Id.,* 515 (concurring opinion). See also *Green v. Frazier,* 253 U.S. 233 (1920). This principle surely is part and parcel of the doctrine of separation of powers, which is firmly embedded in the Constitution. See *Immigration & Naturalization Service v. Chadha,* 103 S.Ct. 2764 (1983). It is said that this doctrine has no application to conflicts between the federal judiciary and the states, see *Elrod v. Burns,* 427 U.S. 347, 352 (1976); see also *Baker v. Carr,* 369 U.S. 186 (1962); and that the states and their agencies are necessarily subject to the federal judicial power to enforce lawful decrees, see *Commonwealth of Virginia v. State of West Virginia,* 246 U.S. 565 (1918); but the ability of federal courts to levy or coerce the levy of taxes was deliberately left open in *Virginia v. West Virginia, supra.* Until the orders in question here, no federal court has purported to directly assume a continuing power to order the levy and collection of taxes, not otherwise authorized by law, even to fund the most draconian remedies for constitutional violations. As this case demonstrates, judicial taxation does not affect merely spending priorities of the state and its agencies; it directly mulcts the people to provide funds for judicially-decreed expenditures. Under these circumstances, the question of the *power* of the judiciary to tax is a question of separation of powers, and must be evaluated not only in light of that doctrine, but also in light of

the reservation of rights by the people expressed in the Ninth Amendment. For if the people delegated the power to tax to the legislative branch only, how then can judicial taxation occur?

In this case, express constitutional or statutory authority (state or federal) is wholly absent to support the taxation decrees of the lower courts.[7] The School Board was under a statutory duty to reduce property tax revenue by one-half of its estimated new sales tax revenue; it has absolutely no authority to increase its taxes without a vote of the people of the City of St. Louis. See Mo. Const. art. X, §§11, 16-22, Appendix H, pp. A346-A347. Clearly, the only possible basis for the lower courts' action in assuming control of the school tax rate in the City of St. Louis is the Fourteenth Amendment, and then only if it provides an independent grant of power to the judiciary to levy taxes. Such is not the case. Nothing in the Amendment itself or in the debates concerning it in Congress, see Cong. Globe, 39th Cong., 1st Sess., 6, 806, 1033, 2444ff., 2459ff., App. 217ff., lends support to the notion that taxes may be levied by a federal court even to remedy a constitutional violation. A remedy may require other officers of government to act to raise funds, but the manner of levy, the amount, and the mode of its collection must be controlled by statute—whether state or federal.[8] See *Plaquemines Parish School Bd. v. United States,* 415 F.2d 817 (5th Cir. 1969). This axiom was plainly un-

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[7] The School Board had absolutely no authority to enter into an agreement contracting away its taxing power, Mo.Const. art. X, §2. If the Board had unfettered discretion to raise taxes above their current rates, this entire controversy would be moot. It is the district judge to whom the Board looks for authority to justify (*post hoc*) its settlement agreement in this respect.

[8] The Fourteenth Amendment contains an express grant of enforcement authority to Congress. It would seem that Congress, the repository of legislative power under the Constitution, could act to authorize federal judicial intrusion into taxation, though otherwise such judicial activity would be forbidden. Cf. *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Virginia v. West Virginia, supra.* Of course, that has not occurred here.

palatable to the court of appeals, whose majority opinion demonstrates a determined misunderstanding of separation of powers, and an equally determined intention to achieve dispersal of black students attending one-race schools in the City of St. Louis, and capital renovation of the St. Louis School Board's system, no matter what the financial or constitutional cost. However, the only course which preserves fundamental liberties of the people is to recognize that the federal courts do not enjoy some independent, remedial power to levy taxes. As JUSTICE BRANDEIS remarked long ago, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." *Olmstead v. United States,* 277 U.S. 438, 479 (1928).

The evil residues of slavery in this country cannot be cured by creating a new form of servitude. "The power to tax is...the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people." *Loan Association v. Topeka, supra,* 87 U.S. at 663. Neither Article III nor the guaranty of equal protection of the law warrants judicial exercise of this power, which would, as applied here, deprive the citizens of the City of St. Louis of the right to control taxation, while leaving the rest of the state and nation free to enjoy that most crucial of all rights.[9] The Ninth Amendment, read in light of American constitutional history and Arti-

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[9] The national importance of the orders in this case cannot be underestimated, for the decision of the court of appeals concerning remedial taxation cannot be limited to school desegregation cases. Even superficial research reveals that hundreds of state and local governmental agencies are at this moment subject to federal remedial decrees affecting schools, prisons, hospitals, and various other institutions, and entailing substantial expenditures. If the decisions of the district court and the court of appeals stand, it is likely that financially strapped local governments will not tarry in flocking to the federal courts to secure their own sources of funds. Cf. Appendix D, p. A148.

cle I of the Constitution, precludes the notion that there is some remedial power of taxation inherent in the federal courts. If the Ninth Amendment means anything at all, it must mean that the right to be taxed only by consent is protected by the Constitution.

Only review by this Court can prevent the lower courts' unlawful course of action, "the end of which no wisdom can foresee."[10] *Heine v. The Levee Commissioners,* 86 U.S. (19 Wall.) 655, 661 (1874).

B. The judgment below cannot stand in light of considerations of federalism, comity, the inherent limitations on the equitable powers of the federal courts, and the policy underlying 28 U.S.C. §1341.

The decisions of the district court and the court of appeals also implicate important questions of federalism and inherent limitations on the equitable powers of federal courts. See *Milliken v. Bradley (II),* 433 U.S 267 (1977); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973). The district court's orders have swept away the individual petitioners' right to vote, significant state constitutional and statutory restrictions on taxation by the St. Louis School Board, and, so far as the people of the City are concerned, the principle that taxation without representation is tyranny. Cf. *Evans v.*

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[10] It is vitally important to recall that the settlement agreement enforced by the lower courts places no limit whatsoever on the amount or duration of judicial taxation. The evidence adduced at the "fairness hearing" convincingly demonstrated that the cost of the settlement agreement could be enormous, and entail the addition of thousands of personnel by the St. Louis School Board. It is therefore inconceivable that judicial taxing orders can be terminated after any definite period of time, or that additional tax rate increases will not be sought as a matter of course by the School Board. See Appendix C, pp. A125-A28, A130, A134; Appendix D, pp. A148-A149; Appendix E.

Buchanan, supra; San Antonio Independent School Dist. v. Rodriguez, supra. The district court made no findings that the settlement agreement was in fact an appropriate remedy for any constitutional violation (the previous intradistrict remedy continues in full force and effect, without a tax increase, see Appendix A, pp. A40-41). No findings were made that additional taxation in the City of St. Louis was in fact necessary, or that the school tax structure in the City, or the statutory property tax reduction scheduled for July, 1983, was implicated in any adjudicated constitutional violation. For these reasons alone, the actions of the lower courts constitute the gravest abuse of judicial power and discretion since *Milliken v. Bradley I, supra.*

Although the court of appeals has made a major effort to supply the deficiencies of the district court's order approving the settlement agreement and assuming control of school property taxes, there remains substantial confusion concerning the nature of the settlement which the lower courts are enforcing. The order approving the settlement agreement, and the hearing on the agreement, were based entirely on the standards enunciated under Rule 23(e), F.R.Civ.P., governing class action settlements. See Appendix A, pp. A13-A14, and *passim.* At no time prior to appeal did the district court or anyone else indicate that the proposed settlement agreement was being considered as a modification of previous remedies for intradistrict liability. See Appendix K, p. A477 (Bowman, Circuit Judge, dissenting). Yet, when it came to approving the funding provisions of the settlement agreement, the district court suddenly shifted its ground, and attempted to rely on the adjudicated liability of the State and City School Board, ignoring the express purpose of the agreement, its interdistrict scope (student transfers were to occur not only between City and County districts, but also among and within County districts), and the undisputed fact that a large part of the settlement agreement was designed to renovate the entire City school system, for the purpose of making it more attractive to County students, and not only, or even primarily, to provide special remedial attention to all-black schools in the system. *Id.*, A31-A35; compare Appendix C, pp.

A135-A144 ("...the City Board has analyzed the needs of the school system and proposes herein the measures it would take to improve the quality of education in *all* of its schools." *Id.* at A144, emphasis added.) See also *id.*, pp. A69-A70.

This Court has made it clear that the inherent limitations on the equitable powers of the federal courts require that all remedial decress be tailored to the nature and scope of the proven constitutional violation. *Milliken v. Bradley (II), supra; Dayton Bd. of Education v. Brinkman (I),* 433 U.S. 406 (1977). The lower courts' taxing orders and the settlement agreement are tailored to nothing, except a compromise: "an agreement to settle the litigation involving paragraph 12(c) [of the district court's original remedial decree, Appendix G, p. A329] and the plaintiffs' interdistrict claims." Appendix C, p. A55. The cost of this compromise may well exceed a billion dollars. By the standards of *Milliken II* and *Dayton I,* the purposes for which the lower courts have assumed taxing power are insupportable. This case is the precise interdistrict analogue of *Dayton I.* In that case, this Court reversed an order for implementation of a system-wide remedy, based on findings that proven violations were limited to specific parts of a school district. Here, the lower courts have implemented a metropolitan remedy, based on findings that proven violations affected only a single school district, and without any findings whatsoever that the elaborate educational and capital renovation programs called for are remedial in fact. The lower courts' concern for the continuing existence of one-race schools within the City of St. Louis alone does not warrant the remedy selected, i.e., enforcement of the settlement agreement.

Finally, the lower courts' assumption of taxing powers in the City of St. Louis pursuant to the settlement agreement, and particularly the order enjoining any reduction in the School Board's property tax levy required by state law, clearly contravene the policy, as well as the letter, of 28 U.S.C. §1341. This Court recently has had occasion to emphasize the considerations of comity and federalism underlying that statute.

Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981). Here, the district court and court of appeals have deliberately and directly displaced state constitutional and statutory provisions governing property taxes in the City of St. Louis, quite without any finding that those constitutional and statutory provisions impermissibly interfere with a remedial decree of a federal court, cf. *Wright v. Council of Emporia,* 407 U.S. 451 (1972), or are themselves infected with a constitutional violation. On its face, the state sales tax law, "Proposition C," will provide twice as much money for education in St. Louis as will be lost by the tax reduction forbidden by the district court; but the lower courts nevertheless forbade the property tax reduction in 1983, so that the St. Louis School Board could allocate that money to the settlement, and still be free to spend the sales tax revenue as it saw fit! See Appendix A, pp. A35-A36. Comity, if nothing else, demands that district judges (and courts of appeals) proceed with much less insouciance in dealing with taxation than in any other area of local administration which might be involved in constitutional litigation. Cf. *San Antonio Independent School Dist. v. Rodriguez, supra;* see also *Welsch v. Likins,* 550 F.2d 1122 (8th Cir. 1977), vacating a district court order forbidding state mental health officers and agencies from observing state fiscal and budget laws.

Petitioners believe that the time has come to answer the critical question concerning judicial taxation left unanswered in *Virginia v. West Virginia, supra,* and in modern "institutional reform" cases. It would certainly be well within this Court's supervisory powers to grant the writ of certiorari solely because the lower courts failed to observe established considerations of comity or to proceed with proper circumspection in the sensitive area of taxation. But the errors in this regard merely reenforce the need for this Court to grant the petition herein to decide that the federal courts have *no* authority to do what was done in this case.

In sum, the lower courts have assumed the fatal power of taxation, cf. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 427

(1819), pursuant to a settlement agreement, when they could not do so pursuant to a judicially-fashioned remedial decree. They have proceeded on a confused theory and an insufficient record. They have ignored 28 U.S.C. §1341, fundamental principles of separation of powers, federalism, comity, and the inherent limitations on the equitable powers of the federal courts. The circumstances of this case do not warrant disregard of the basic tenet that, under our Constitution, there are some things that government, including the judiciary, simply cannot do. Only this Court can effectively preserve the constitutional balance by granting a writ of certiorari forthwith.

II. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT CONCERNING THE EQUITABLE POWERS OF FEDERAL COURTS, AND IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Viewed in their most limited fashion, i.e., as remedial decrees, the decisions of the district court and the court of appeals fly in the face of controlling standards for such decrees laid down by this Court in numerous cases. Notwithstanding the efforts of the court of appeals to supply findings not made by the district court, but cf. *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), it is evident that the settlement agreement is not and cannot be a remedy tailored to the nature and scope of the intradistrict constitutional violation proved in this case. It is one thing to fashion a remedy which provides opportunities for victims of intradistrict segregation to transfer to desegregated schools outside the district, it is quite another to order taxation and the expenditure of hundreds of millions of dollars to finance a metropolitan freedom-of-choice plan, and massive renovation of one school system to make it perhaps more attractive for students transferring from other districts not found to have been implicated in a constitutional violation. In this respect, as noted, the lower courts have acted in a manner wholly inconsistent with *Dayton Bd. of Education v. Brinkman (I),*

supra, by attempting to impose a metropolitan remedy for an intradistrict violation, without the consent of those who are expected to pay for it, and by ordering extensive educational and capital renovation programs without any effort to ascertain whether they are in fact "remedial."

The injunction against the operation of "Proposition C," Mo. Rev. Stat. §164.013, (Supp. 1983), Appendix H, pp. A347-A350, is similarly inconsistent with the requirement laid down in *Milliken v. Bradley (I), supra,* and kindred cases, that decrees in cases like this must be truly remedial, i.e., the condition addressed by the remedy must have been caused by the constitutional violation. The operation of a sales tax law designed to provide additional revenue to education, while providing property tax relief to the taxpayers, in every school district in the state, cannot by any rhetorical metastasis be deemed the product of a constitutional violation. Moreover, there were, and can be, no findings that Proposition C will operate to impede desegregation. See *Wright v. Council of Emporia, supra; United States v. Scotland Neck City Bd. of Education,* 407 U.S. 484 (1972). The state law will provide the St. Louis School Board with two dollars in sales tax money for every dollar of property tax lost. Assuming that state tax laws can be evaluated under the standards laid down in *Wright* and *Scotland Neck,* it is patent that Proposition C does not and cannot hinder the process of school desegregation, or in any way impede the dismantling of the dual system found to have existed in the St. Louis City schools. The court of appeals admitted as much in holding that the injunction against the operation of Proposition C in the City of St. Louis cannot stand even in the light of standards enunciated by that court, not to mention this Court's standards. Yet, in a feat of illogic to be discussed at greater length *infra,* the court refused to reverse the district court and return the money to the people of the City. In this respect, the judgment of the court of appeals is at war with its opinion.

The decision of the court of appeals is also directly in conflict with cases from this Court holding that the federal courts do not enjoy the power to levy taxes, absent statutory authority. E.g., *Meriwether v. Garrett, supra.*

The decision of the court of appeals is similarly in conflict with the cases in other circuits, namely the Third and Fifth (now Eleventh), which have addressed the issue of taxation in the context of desegregation decrees, and is plainly in conflict with decisions of the Sixth Circuit concerning the permissible scope of remedies in such cases.

In *Evans v. Buchanan, supra,* the Third Circuit held that the operation of a state school tax law could not be enjoined simply because it did not conform to the amount authorized by a district court for imposition in a consolidated school district created by decree. Mandamus was granted to compel the district court to review the state statute in question (which substituted a rate fixed by the legislature for that authorized by the court in the consolidated district) in light of standards of deference customarily followed in reviewing constitutional challenges to tax laws. Cf. *San Antonio Independent School Dist. v. Rodriguez, supra.* Because the state legislature had acted to substitute its tax rate for that of the district court, the Third Circuit was able to avoid addressing the underlying question of taxation without representation clearly presented here. Nevertheless, *Evans* conflicts with the decision of the court of appeals here, insofar as it compelled the district court to defer to the operation of state tax laws. The decisions in this case show no such deference.

The court of appeals in this case also disregarded *Plaquemines Parish School Bd. v. United States,* 415 F.2d 817 (5th Cir. 1969), to the extent that the latter case rejected the proposition that *Griffin v. School Board of Prince Edward County, supra,* authorized judicial taxation without regard to state statutory or constitutional provisions respecting amount. *Pla-*

quemines also rejected the notion, adopted by the courts below in this case, that district courts should control how school districts raise money to comply with remedial decrees. Cf. Appendix K, p. A473 (Gibson, Circuit Judge, dissenting).

Insofar as it purports to authorize massive renovation of the St. Louis School Board's system under the guise of remedying the intradistrict violation, the decision of the court of appeals here squarely conflicts with that of the Sixth Circuit in *Oliver v. Kalamazoo Bd. of Education,* 640 F.2d 782 (6th Cir. 1980). There, the Sixth Circuit rejected an order imposing an expensive array of educational programs in a school district which had maintained a dual system, because there were no findings or proof that the programs were reasonably related to curing the constitutional violation or its effects. It is plain that the court of appeals in the case at bar took a radically different view of the need for proof of the constitutional necessity of massive school district renovation plans, especially capital improvements, before ordering such plans into effect. Here, the court of appeals seems to believe that once a school system is found to be infected with a constitutional violation, even the buildings within the system must be "restored" to some sort of "constitutionally acceptable" standard. Appendix K, p. A448. The view of the court of appeals in the instant case cannot be reconciled with the decision of the Sixth Circuit, and only this Court can determine which is correct.

Finally, it should be observed that the decision of the court of appeals, denying the petition for writ of prohibition filed by petitioner, is contrary to the standards laid down by this Court for granting such extraordinary relief. "The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus offer an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise

its authority when it is its duty to do so." *Ex parte Republic of Peru,* 318 U.S. 578, 583 (1943); see also *Evans v. Buchanan, supra.*

Here, as in *Schlagenhauf v. Holder,* 379 U.S. 104 (1964), the gravamen of petitioners' claim in the court of appeals was lack of power in the district court to enter an order which was the first of its kind in any reported federal decision, and which raised new and important problems. "It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." *Heine v. The Levee Commissioners, supra,* 86 U.S. (19 Wall.) 661. The action of the district court here is surely of greater moment than the order under Rule 35, F.R.Civ.P., which warranted a petition for writ of mandamus in *Schlagenhauf, supra.* See also *DeBeers Consol. Mines v. United States,* 325 U.S. 212 (1945). Like the order in *DeBeers,* the district court's orders affecting the school property tax rate in the City of St. Louis were authorized neither by statute nor by the usages of equity; and they violate a positive Congressional policy embodied in 28 U.S.C. §1341. No more appropriate case for the intervention of the court of appeals by means of a writ of prohibition could have been imagined; yet that court first delayed and then refused to act, and thereby ignored the standards laid down in *Schlagenhauf, supra* and other cases in this Court.

III. THE DECISION OF THE COURT OF APPEALS, IN EFFECT REWRITING AN INTERDISTRICT SETTLEMENT INTO AN INTRADISTRICT REMEDY, SUPPLYING FINDINGS WHOLLY OMITTED BY THE DISTRICT COURT, UNWARRANTABLY DELAYING DECISION ON A WRIT OF PROHIBITION, AND REFUSING TO DISTURB AN ADMITTEDLY ERRONEOUS INJUNCTION WHICH INFRINGED UPON THE RIGHTS OF THE INDIVIDUAL PETITIONERS AS VOTERS AND TAXPAYERS, IS SUCH A DEPARTURE FROM THE ORDINARY COURSE OF JUDICIAL PROCEEDINGS THAT INTERVENTION BY THIS COURT IS NECESSARY.

Some of the more unusual features of the decision of the court of appeals have been described above: delaying consideration of a writ of prohibition until after appeals were heard, in flat defiance of Rule 21(c), F.R.A.P.; substituting or manufacturing findings necessary to support conclusions that certain elaborate educational programs were "remedial" in a constitutional sense, depite a record showing serious conflicts in the evidence, derived from a hearing which was directed not to a remedy but to "fairness" of a settlement agreement; rewriting a settlement agreement; and, last, but certainly not least, refusing to reverse an injunction that the court of appeals itself found to be legally and factually erroneous. These aspects of the decision below combine to demonstrate that the court of appeals is in need of correction through an exercise of this Court's powers of supervision. Supreme Court Rule 17.1(a).

Perhaps the most bizarre aspect of the decision below concerns the district court's injunction forbidding a school property tax reduction in the City of St. Louis. Regrettably, the opinion of the court of appeals verges on mendacity in describing why, despite the concededly erroneous nature of this injunction, it will nevertheless be left in force. One searches the court's September 13 order, Appendix I, pp. A354-A355, 717 F.2d 1180, in vain for some mention of the "equitable considerations" regarding "disruption" of school finance in the City of

St. Louis which would flow from letting the people of the City recover taxes illegally collected. Appendix K at p. A449. There are none. These "equitable considerations" were discovered *post hoc* by a court of appeals majority determined not to embarass the district judge. The implications of this part of the decision of the court of appeals are stunning: it is the functional equivalent of reversing a jury verdict, but ordering the defendant to pay the plaintiff anyway, for "equitable" reasons.

The opinion of the court of appeals, aside from badly mischaracterizing the record, also displays a complete disregard for the proper appellate function and the strictures of Rule 52, F.R.Civ.P. In *Pullman-Standard v. Swint, supra,* this Court rejected the notion that there are certain types of "facts" that can be found on appeal, even if not found, or found otherwise, by the district court. If the court of appeals was aware of *Pullman-Standard,* its opinion certainly does not show it. One reads the opinion with the feeling that the proceedings in the district court were a superfluity: the "fairness hearing" should have been conducted before the court of appeals. On the one hand, the court of appeals is at pains to assert that the district court's orders regarding funding had a sound remedial basis. Appendix K, pp. A438-A439. On the other, the court affirms here and reverses there in a desperate effort to salvage a settlement the majority viewed as socially desirable, but which they knew could not withstand scrutiny under *Milliken II* and *Dayton I, supra.*

Nowhere is the effort of the court of appeals to transform its role into that of factfinder and mediator more apparent than in its discussion of "quality education." Despite its ringing endorsement of such compensatory programs, the court bluepencils most of the programs approved by the district court, because they lack support in the record. Appendix K, p. A445. The court of appeals concludes, however, without citing to the record or to any findings of the district court, that it is constitutionally necessary that the City schools be maintained at the

AAA standard fixed by the state of Missouri. Apparently the court of appeals relies on various citations to educational journals to justify this and several other programs, designed to apply to the entire City school system and not just remaining all-black schools. Appendix K, pp. A443-A445.

The effect of the opinion of the court of appeals is to affirm the district court in ordering the state to fund certain educational programs in all-black schools, but largely to reverse as to system-wide programs. Presumably, this will greatly reduce the cost of the settlement, see Appendix D, pp. A161-A177; Appendix J, pp. A392-A403. However, this result should not obscure the fact that the district court made no findings whatsoever concerning the remedial nature of the settlement agreement or any part thereof. See Appendix A, passim.; Appendix J, pp. A371-A378.True, the district court held that its power to fund the settlement rested on its remedial powers, Appendix A, pp. A33-A34; but it made no effort to tie that conclusion to factual findings concerning all or part of the settlement's massive "quality education" components. Cf. *Oliver v. Kalamazoo Bd. of Education, supra.* Indeed, neither the court of appeals nor the district court troubled to explain how the age and condition of the school buildings in the City school system were the product of a constitutional violation. Instead, the court of appeals asserted that "the State does not question the need to improve facilities, nor its obligation to help pay for these improvements." Appendix K, p. A447. This grossly misstates the position of the State of Missouri, and casts in sharp relief the lack of evidentiary support or findings for the proposition that a multimillion dollar capital renovation in the City school system will somehow remedy segregation.

Even if its opinion were otherwise premised on sound constitutional principles, the court of appeals seriously departed from the accepted course of judicial proceedings in directing the district court to become a "super-legislature" in the matter of budgets and taxes under the appellate version of the settlement agreement. See Appendix K, pp. A455-A459. The court placed

virtually no substantial burden of proof on the St. Louis School Board to prove actual need for additional funds. Surely clear and convincing evidence of total inability to carry out the judicially-mandated programs with existing resources must be required before the district court may become involved in fund-raising. Furthermore, the court of appeals has recognized no requirement that the School Board give absolute funding priority to court-ordered remedial programs. Cf. *Evans v. Buchanan, supra,* 582 F.2d at 779-80. Under the mandate of the court of appeals, the School Board will have little incentive to seek the most cost-effective remedial programs, or to implement any remedial programs in an economical fashion. On the contrary, the incentive for the School Board is to create the greatest appearance of need for additional funds, so that tax revenues of the School Board are always increased.

Thus, the court of appeals has invested the district court with a continuing commission to supervise taxation in the City of St. Louis in order to provide additional funds to the School Board. Who will protect the taxpayers in the future? Petitioners frankly state that it is unlikely that annual hearings on tax rates will always see vigorous adversarial presentations, for it is no light matter to litigate such issues, and there are limits to petitioners' resources. The creation of this judicial taxing and budgeting procedure emphasizes the impropriety of judicial intrusion into what is and always has been a legislative process.

The court of appeals has purported to function as trier of fact and revisor of the settlement agreement below, in order to preserve the latter's constitutionality, and has set forth a blueprint for continuing judicial intrusion into property taxation in the City of St. Louis. The court has refused to reverse an unlawful injunction, thereby destroying the rights of voters and taxpayers, and defying the letter and spirit of express Congressional policy, 28 U.S.C. §1341. Only this Court can correct this egregious result by granting certiorari to review and reverse the court of appeals.

CONCLUSION

"The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." James Madison, *The Federalist,* No. 47, p. 324 (Cooke ed. 1961). The courts below have taken the final step toward such an accumulation of power in the judicial branch, by arrogating unto the judiciary the power to tax. Only this Court can restore the proper balance between the judicial power and the legislative power, between state and nation, and between the rights of equality guaranteed by the Fourteenth Amendment and the quintessential rights of liberty guaranteed by the Ninth Amendment. Petitioners urgently request that this Court issue its writ of certiorari to review and reverse the court of appeals, and forbid the lower courts to exercise the taxing power in the City of St. Louis.

Respectfully submitted,

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